

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

LEROY JAMES SCHMITZ,)	Cause No. CV 06-50-BU-RFC-RWA
)	
Petitioner,)	
)	
vs.)	FINDINGS AND RECOMMENDATION
)	OF UNITED STATES MAGISTRATE
KATHY HAAGLAND,)	JUDGE TO DISMISS PETITION
)	
Respondent.)	

Petitioner Leroy Schmitz filed both a Complaint on the Court's civil complaint form and a document entitled "Petition under 28 U.S.C. & 1983 for Writ of Habeas Corpus by person in state custody." (Document 1.) Out of an abundance of caution the Clerk of Court opened two separate cases, one as a civil rights action under 42 U.S.C. § 1983 (CV 06-51-BU-RWA) and one as a habeas action seeking relief under 28 U.S.C. § 2254 (CV 06-50-BU-RWA).

On July 24, 2006, the Court directed Petitioner to clarify whether he intended to file a petition for writ of habeas corpus, a civil rights complaint, or both. (Document 4.) On August 9,

2006, the Court granted Petitioner's motion to extend the deadline for this filing to September 5, 2006. (Document 6.) Petitioner filed nothing in response to the Court's Order in this his habeas case. However, he filed an Amended Complaint in his civil rights action (CV 06-51-BU-RWA).

Given that Petitioner has not responded in this habeas case and he has responded in his civil rights case, the Court will presume he no longer intends to pursue his habeas case. Petitioner will have an opportunity to object to this recommendation if this is an incorrect presumption.

RECOMMENDATION

In accordance with the foregoing, the undersigned United States Magistrate Judge **RECOMMENDS** that the Petition for Writ of Habeas Corpus be **DISMISSED WITHOUT PREJUDICE**.

NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

The Clerk of Court shall serve a copy of these Findings and Recommendation on Petitioner. Petitioner is advised that, pursuant to 28 U.S.C. § 636(b)(1), he has the right to file written objections to this Findings and Recommendation. Any objections to the Findings and Recommendation must be filed with the Clerk of Court within twenty (20) days after the signing of this recommendation, or objection is waived.

**PETITIONER IS CAUTIONED THAT HE MUST KEEP THE COURT ADVISED OF ANY
CHANGE OF ADDRESS.**

DATED this 7th day of November, 2006.

/s/ Richard W. Anderson
Richard W. Anderson
United States Magistrate Judge